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Supreme Court
FILED

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No.

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IN THE

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1995

JOHN PAUL MARCINEK,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether petitioner was negligent in investing in the GD&L program with respect to the negligence penalty provisions of Internal Revenue Code §§6653(a)(1), (2) and 6653(a)(1)(A), (B).

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PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

The petitioner herein respectfully requests that a writ of certiorari issue to review the Ninth Circuit affirmation of a decision of the United States Tax Court filed December 12, 1995.

OPINIONS BELOW

1. The decision of the United States Tax Court in John Paul Marcinek v. Commissioner of Internal Revenue, T.C. Memo. 1993-631, was filed December 28, 1993. The Tax Court opinion is printed in Appendix A.

2. The Ninth Circuit decision, (unpublished), Docket No. 94-70470, was filed December 12, 1995. The Ninth Circuit opinion is printed in Appendix B.

JURISDICTION

Jurisdiction of this court to review the determination of the Ninth Circuit is conferred by Article III of the United States Constitution. This petition is being mailed to the court within ninety (90) days after the Ninth Circuit judgment on December 12, 1995.

STATUTORY PROVISIONS INVOLVED

Section 6653. FAILURE TO PAY TAX.

(a) Negligence or Intentional Disregard of Rules and Regulations with Respect to Income, Gift, or Windfall Profit Taxes. --

> (1) In general. -- If any part of any underpayment (as defined in subsection (c)(1) of any tax imposed by subtitle A, by chapter 12 of subtitle B, or by chapter 45 (relating to windfall profit tax) is due to negligence or intentional disregard of rules and regulations (but without intent to defraud), there shall be added to the tax an amount equal to 5 percent of the underpayment.
>
> (2) Additional amount for portion attributable to negligence, etc. -- There shall be added to the tax (in addition to the amount determined under paragraph (1)) an

amount equal to 50 percent of the interest payable under section 6601 --

(A) with respect to the portion of the underpayment described in paragraph (1) and which is attributable to the negligence or intentional disregard referred to in paragraph (1), and

(B) for the period beginning on the last date prescribed by law for payment of such underpayment (determined without regard to any extension) and ending on the date of the assessment of the tax (or, if earlier, the date of the payment of the tax).

STATEMENT OF THE CASE

A summary of the relevant background and facts of this case is set forth as follows:

A. Course of Proceeding in the case before the Court.

This case arose upon issuance of a notice of deficiency by the Internal Revenue Service ("IRS") and a petition filed with the United States Tax Court contesting asserted "negligence" penalties under I.R.C. §§ 6653(a)(1), (2) and 6653(a)(1)(A), (B). The Tax Court sustained the Commissioner. On Appeal, the Ninth Circuit affirmed the Tax Court.

B. Summary of facts concerning question presented.

Petitioner graduated from Bucknell University and studied finance along with engineering.

In 1959, petitioner joined Kaiser Aluminum as a specialist in evaluating projects. From 1959 to 1972, he concentrated on the transportation industry and was extensively involved as project manager in investigating the transportation container market and the leasing of containers with application of aluminum to that market. His ongoing analysis involved dealing with costs and values of containers. An integral part of the studies was an analysis of the tax law involving the investment tax credit and depreciation.

In 1972, petitioner left Kaiser Aluminum to work as a pension and annuity analyst in the insurance industry. Later, petitioner left the insurance industry to become director of Central Banking Systems. According to petitioner, as director of Central Banking Systems, he developed a nontaxable retirement investment, the forerunner of the IRA. Petitioner retired in 1976 and has been an independent investor ever since.

In 1982, the Gold Depository and Loan Company, ("GD&L") first came to petitioner's attention when his wife, who at that time was managing her mother's assets, became interested in investing in GD&L. Petitioner stated that he and his wife carefully read the prospectus and promotional materials provided by GD&L and made an independent

evaluation of the investment's feasibility based on his knowledge of the container industry and their knowledge of taxation. Petitioner contacted others in the industry. Although no one petitioner spoke with was familiar with GD&L, he was able to confirm that GD&L was charging approximately market price for the containers that it was purportedly selling.

GD&L was a company that promoted and purported to sell marine-dry containers of the type used by ocean-going cargo vessels for the carriage of dry cargo.

As the Tax Court found, the details of the GD&L program are set forth, in Amsler v. Commissioner, T.C. Memo 1993 - 289; Shortal v. Commissioner, T.C. Memo, 1992 - 560; Weiler v. Commissioner, T.C. Memo, 1990 - 562.

In 1985, petitioner decided to make his own investment in GD&L. By that time, petitioner, who had inherited his mother-in-law's investment in GD&L, had been involved with GD&L for almost three years. He had been receiving communications from GD&L for nearly three years, including, year-end reports, tax information, confirmations, and other materials. On the occasions when petitioner personally contacted GD&L, he was impressed with the professionalism and prompt responses.

Based on petitioner's experience with GD&L and his knowledge of the container industry, petitioner concluded that GD&L was a legitimate, prudent investment. On June 7, 1985, petitioner signed an agreement for the purchase and lease of 10 40-foot dry

containers and 30 20-foot dry containers. Petitioner paid $5,000.00 in cash for containers having a reported value of $100,000.00. The balance, $85,000.00, was to be a loan from the Co-Op Investment Bank, Ltd. A note was not signed by petitioner, but the containers were collateral for the loan.

The containers petitioner believed he had purchased were nonexistent. In short, the GD&L program was a complete fraud on him and numerous others.

ARGUMENT I

PETITIONER WAS NOT NEGLIGENT IN INVESTING IN THE GD&L PROGRAM WITH RESPECT TO THE NEGLIGENCE PENALTY PROVISIONS OF INTERNAL REVENUE CODE §§ 6653(a)(1); 6653(b)(2)(A), (B).

In the Tax Court proceeding petitioner maintained that he is not liable for the negligence penalties determined by the IRS with respect to his involvement in the GD&L program. Petitioner argued that the evidence clearly supported his position that he had longstanding and substantial knowledge of the transportation container industry and was an experienced investor, along with his wife.

GD&L purported to arrange the purchase of and management of marine containers for cargo leasing. The GD&L program was an elaborate and sophisticated fraud perpetrated by a former IRS attorney. The fraud was so well conceived and carried out that even a person of petitioner's background and knowledge was duped. He was

one of numerous others who were victimized. (See the Tax Court opinion for other GD&L reported cases cited therein. Appendix A).

It is, of course, not enough that petitioner was defrauded of his money and is responsible for the tax deficiencies and ordinary interest. The IRS, the Tax Court and the Ninth Circuit seek to punish petitioner further by holding him responsible for negligence penalties. This is unfair and unjust, and beyond the scope and purpose of the penalty provisions involved.

The Tax Court in dealing with any and all cases involving so called "tax shelter" litigation has acted excessively in imposing penalties. See Ferrell v. Commissioner, 90 T.C. 1154 (1988); Rybank v. Commissioner, 91 T.C. 524 (1989), Milner v. Commissioner, 62 T.C.M. 791 (1991).

The government was responsible for the presence of, and continuation of, an environment that allowed, and no doubt encouraged, abuses and out-right fraud in tax motivated transactions. **In the 60's, 70's and early 80's, tax policy favored tax advantaged investments of questionable economic value to source venture capital for energy, housing, food, entertainment and other industries.** See Mosburg, Tax Shelter Desk Book, Institute of Business Planning, (1980), Lib. of Congress card #78-057937.

The Tax Reform Act of 1964 (pub. L. No. 91-172, 83 stat 487 (1969)) focused on certain preferences benefiting high income individuals. It left equipment leasing, oil and gas, and real estate largely untouched.

The Revenue Act of 1971 (pub L. No. 92-178, 85 stat. 497 (1971)) reenacted the investment credit and put into effect new depreciation schedules, i.e., ADR. It was not until the Tax Reform Act of 1976 (pub L. No. 94-455, 90 stat. 1520 (1976)) that tax shelters were even targeted. This legislation introduced the "at risk" concept for certain activities excluding real estate. ITC benefits were still fully available on non-recourse loans until the mid-80's. (See: Sax, Lawyer's Responsibility in Tax Shelter Opinions, Tax Lawyer, Vol. 34, No. 1. for an excellent and scholarly review of tax motivated transaction history).

In the 70's and early 80's, the courts were having substantial difficulty in formulating new legal principles to deal with the expanding tax shelter phenomenon. In fact, the courts proceeded (ex post facto) to change time honored tax rules by introducing, for example, limits on the inclusion of liabilities in partnership basis. An explosion of tax shelter litigation occurred in the 70's and mid-80's. See David L. Narver, Jr., 75 T.C. 53, aff'd 680 F 2d 855 (9th Cir. 1982); Marshall Long v. Commissioner, 71 T.C., (1978). Also see Estate of Franklin v. Commissioner, 544 F 2d 1045 (9th Cir. 1976). Compare, Albany Wheel v. Commissioner, 40 T.C. 831 (1963). It is well to note the opinions in Brannen v. Commissioner, 78 T.C. 471 (1982), aff'd 722 F 2d 695 (11th Cir. 1984); Fox v. Commissioner, 80 T.C. 972 (1983), aff'd 742 F 2d 1441 (2nd Cir. 1984); Hager v. Commissioner, 76 T.C. 759 (1981); Jasinonowski v. Commissioner, 66 T.C. 312 (1976), and numerous other cases which

reflect the conceptual confusion and struggle the courts were having in considering even well developed factual situations.

The Marcinek case involves petitioner's investment considerations falling within the time zone when the Congress, IRS and the courts where having major difficulties in attempting to determine what an "abusive" tax transaction was and was not.

Now, ten to fifteen years later, after the courts have more or less reached a consensus, the government claims that Marcinek should have been such a prudent, astute investor that he would not have allowed himself to become a tax shelter victim. Not only was petitioner duped, but throughout the 70's and into the mid-80's, the state of the law, both statute and decisional, was so confused and unsettled, petitioner must truly be judged to have acted with due care in the context of the times.

In the Ninth Circuit the legal test with respect to negligence penalties is whether the taxpayer acted as a reasonable, prudent person. Zmuda v. Commissioner, 731 F 2d 1417 (1984).

The facts in this case demonstrate that the Tax Court and Ninth Circuit determinations are clearly in error.

Petitioner had longstanding experience in understanding and analyzing container leasing programs. For a number of years he was a project manager for such programs with Kaiser Aluminum. He supervised a number of

individuals dealing with all aspects of financing and marketing of containers. His wife was a financial analyst. Both he and his wife reviewed the GD&L program and were satisfied of its apparent worth. There was nothing to put them on notice that GD&L was a fraud. In fact, petitioner personally called the GD&L offices and received professional responses. He verified the registration. He observed that respected advisors were involved. He reviewed an opinion letter from an attorney, John MacKay, and an opinion from CPAs Alexander Graham & Company endorsing the program.

The pricing of the containers and the lease structure comported with industry standards.

The container loan was collateraled by the equipment purchase.

The Ninth Circuit cites Wolf v. Commissioner, 4 F.3d 709 (9th Cir. 1993) and Kanter v. Commissioner, 998 F.2d 1514 (9th Cir. 1993) in affirming the Tax Court and holding that an ordinary prudent investor would not have invested in GD&L considering that its plan contained "sufficient warning signs." The Court goes on to say that it was not reasonable and prudent for an investor to have paid only $5,000 and then claim tax benefits based on an investment of $100,000. **But this kind of leverage is exactly what the law permitted at the time.** There were no warning signs considering the time frame. For example, it was common knowledge to the ordinary person that one could make a down payment on a fraction of the total cost of "rental" property, finance the balance, and then even claim accelerated

depreciation. Typically, the tax benefits far exceeded the cash down. See Geller, Depreciation on Real Estate and its Recapture; 29 N.Y.U. Inst. 1033 (1971); and Morris, New Developments in Packaging the Real Estate Venture for the Private Investor, 20 Tul. Tax. Inst. 147 (1971). Also see Sax, Lawyer's Responsibility in Tax Shelter Opinions, notes 17, 57, supra.

The Ninth Circuit states that petitioner "concedes he entered into a sham transaction." This statement is patently wrong. It was not until the GD&L program was exposed as a fraud, long after petitioner and numerous others became involved, that petitioner became aware of the fraud.

This case may seem insignificant; however, thousands upon thousands of taxpayers have been grossly mistreated by the IRS and lower courts in summarily penalizing persons who acted within what at the time was standard, acceptable investment behavior and strategy.

Moreover, is one to take seriously the proposition that the ordinary person is expected to spend endless hours researching a relatively limited investment opportunity, even to the point that a person cannot rely on legal and accounting opinions. The Ninth Circuit says so and is incorrect. See the Circuit's citation to Hildebrand v. Commissioner, 967 F.2d 350 (9th Cir. 1992).

Finally, the Circuit endorses what it says is an "objective" test to be applied under I.R.C. §6653. This test is not correct and a "good faith" test is the

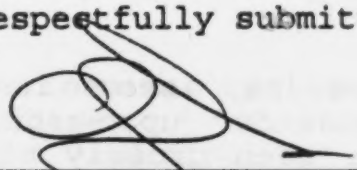
appropriate test, as it is under other provisions of the Code, i.e., I.R.C. §183.

Regardless of the test, petitioner was a victim (in good faith) and the Circuit should be reversed. It is absolutely no wonder that ordinary citizens are dismayed with the tax system and the administration of such that unfairly punishes under the circumstances of this case, and under untold similar situations.

CONCLUSION

Based upon the foregoing, a writ should be issued.

Respectfully submitted,



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APPENDIX

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T.C. Memo 1993-631

UNITED STATES TAX COURT

JOHN PAUL MARCINEK, Petitioner, v.
COMMISSIONER OF INTERNAL REVENUE,
Respondent

Docket No. 18099-89. Filed December 28, 1993

Edward B. Simpson, for petitioner.

Patricia A. Golembieswski, for respondent.

MEMORANDUM OPINION

DINAN, Special Trial Judge: This case was heard pursuant to section 7443A(b) and Rules 180, 181 and 182.[1]

Respondent determined deficiencies in petitioner's Federal income tax and additions to tax as follows:

Year	Deficiency
1982	$7,182.50
1983	6,142.50
1984	3,398.00
1985	14,465.00
1986	14,612.00

[1]Unless otherwise indicated, all section references are to the Internal Revenue Code in effect for the years in issue, and all Rule references are to the Tax Court Rules of Practice and Procedure.

Year	Sec. 6653(a)(1)[1]
1982	$359.12
1983	307.12
1984	194.90
1985	723.25
1986	730.60

Year	Sec. 6653(a)(2)
1982	[3]
1983	[3]
1984	[3]
1985	[3]
1986	[3]

Year	Sec. 6659
1982	$2,154.75
1983	1,842.75
1984	1,169.40
1985	4,339.50
1986	4,383.60

Year	Sec. 6661[2]
1982	$1,796.00
1983	1,536.00
1984	---
1985	3,616.00
1986	3,653.00

[1] Sec. 6653(a)(1)(A) and (B) for 1986.

[2] Respondent determined in the alternative, that if petitioner was found not to be liable for the sec. 6659 addition to tax, petitioner was liable for the addition to tax imposed pursuant to sec. 6661.

[3] 50 percent of the interest due on the portion of the underpayment attributable to negligence.

Respondent also determined that petitioner is liable for an increased rate of interest under section 6621(c).

After concessions by the parties at trial, the issues remaining for decision are: (1) Whether petitioner is liable for the section 6653(a)(1) and (2), and section 6653(a)(1)(A) and (B) additions to tax, as applicable, and (2) whether petitioner is

entitled to Section C deductions beyond those allowed by respondent.

Some of the facts have been stipulated and are so found. The stipulations of fact and attached exhibits are incorporated herein by this reference. Petitioner maintained his legal residence in the State of California on the date the petition was filed in this case.

From 1959 to 1972, petitioner was a managerial employee of the special projects division at Kaiser Aluminum specializing in the transportation industry. During the late 1960s and early 1970s petitioner conducted multiple marketing studies on the application of aluminum to the container market. According to petitioner, integral to these marketing studies was an analysis of the tax laws, specifically the investment tax credit and depreciation.

In 1972, petitioner left Kaiser Aluminum to work as a pension and annuity analyst in the insurance industry. Later, petitioner left the insurance industry to become director of the Central Banking Systems. According to petitioner, as director of Central Banking Systems, he developed a nontaxable retirement investment, the forerunner of the IRA. Petitioner retired in 1976 and has been an independent investor ever since.

In 1982, Gold Depository and Loan Company (GD&L) first came to petitioner's attention when his wife, who at that time was managing her mother's assets, became interested in investing in GD&L. Petitioner stated that he and his wife carefully read

the prospectus and promotional materials provided by GD&L and made an independent evaluation of the investment's feasibility based on his knowledge of the container industry and their knowledge of taxation. Petitioner contacted others in the industry. Although no one petitioner spoke with was familiar with GD&L, he was able to confirm that GD&L was charging approximately market price for the containers they were purportedly selling.

GD&L was a company that promoted and purported to sell marine-dry containers of the type used by ocean-going cargo vessels for the carriage of dry cargo. The specific features of the GD&L investment plan and the assets petitioner believed he was purchasing are described in detail in Amsler v. Commissioner, T.C. Memo. 1993-289, Shortal v. Commissioner, T.C. Memo. 1992-560, and Weiler v. Commissioner, T.C. Memo. 1990-562. In short, the containers petitioner believed he was purchasing were nonexistent. The entire transaction was a sham.

In 1985, petitioner decided to make his own investment in GD&L. By that time, petitioner, who had inherited his mother-in-law's investment in GD&L, had been involved with GD&L for almost 3 years. He had been receiving for nearly 3 years communications from GD&L: Year-end reports, tax information, confirmations, and other materials. On the few occasions when petitioner personally contacted GD&L, he was impressed with their professionalism and prompt responses.

Based on petitioner's experience with GD&L and his knowledge of the container industry, petitioner concluded that GD&L was a legitimate, prudent investment. On June 7, 1985, petitioner signed an agreement for the purchase and lease of 10 40-foot dry containers and 30 20-foot dry containers. Petitioner paid $5,000 in cash for containers having a reported value of $100,000. The balance, $95,000, was to be a loan from the Co-Op Investment Bank, Ltd., yet no note was ever signed by petitioner.

Petitioner now agrees that the containers never existed. Consequently, he concedes that he is not entitled to the investment tax credits and Schedule C losses associated with the investment. The only issue remaining regarding GD&L is whether petitioner is liable for additions to tax for negligence.

Section 6653(a) imposes an addition to tax equal to 5 percent of the underpayment of tax if any part of the underpayment is due to negligence or intentional disregard of rules or regulations. Section 6653(a)(2) imposes an addition to tax in the amount of 50 percent of the interest due on the portion of the underpayment attributable to negligence. Negligence is the failure to use due care or to do what a reasonable and ordinarily prudent person would do under the circumstances. Zmuda v. Commissioner, 731 F.2d 1417, 1422 (9th Cir. 1984), affg. 79 T.C. 714 (1982); Neely v. Commissioner, 85 T.C. 934, 947 (1985). Respondent's determination of negligence is presumed to be correct, and petitioner bears the burden of proving otherwise. Hall v. Commissioner, 729 F.2d 632, 635 (9th Cir. 1984), affg.

T.C. Memo. 1982-337; Bixby v. Commissioner, 58 T.C. 757, 791 (1972).

Petitioner contends that he was not negligent in investing in GD&L. He argues that he is a container industry expert and an experienced investor, and that before investing in GD&L he made a thorough and comprehensive evaluation of the merits of the investment. We disagree.

We do not find that when petitioner invested in GD&L he was either a container industry expert or an experienced investor. Petitioner's contact with the container industry was when he was an employee of Kaiser Aluminum, which was 13 years before he became involved in GD&L. There is no evidence that in 1982 he was familiar with the then current container leasing or industry manufacturing practices.

If petitioner were an investment expert, we do not believe he would have made such an investment. See Shortal v. Commissioner, supra.[2] The only purpose of the GD&L investment was the avoidance or evasion of Federal income tax. Shortal v. Commissioner, supra. A reasonable and ordinarily prudent investor, to say nothing of an investor as knowledgeable as petitioner claims to be, would have questioned an investment that allowed a taxpayer to claim tax benefits computed on

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[2]In Shortal v. Commissioner, T.C. Memo. 1992-560, the Court said of petitioner: "He was not a tax expert. Nor does it appear that he was an expert in the investment field." We agree.

an investment of $100,000 when the investor only paid $5,000 and was not required to sign a promissory note for the balance.

Moreover, the failure of petitioner to make a meaningful investigation beyond the promotional materials supplied by the sales people or to consult independent advisors is not reasonable or in keeping with the standard of the reasonable and ordinarily prudent investor. LaVerne, et al. v. Commissioner, 94 T.C. 637, 652-653 (1990), affd. without published opinion sub nom. Cowles v. Commissioner, 949 F.2d 401 (10th Cir. 1991); Weiler v. Commissioner, supra. Here, petitioner did not conduct a meaningful investigation of GD&L before making his investment. Petitioner based his decision to invest on his prior experiences with GD&L, which up to that point had been the receipt of bogus communications, a few phone conversations, and his earlier reading of the prospectus and promotional materials.

In addition, petitioner did not examine any GD&L containers--not when he invested or when he encouraged his mother-in-law to invest. Petitioner did not know the identity of alleged lessees of his containers. Petitioner did not review any of the leases. On the one occasion when petitioner did ask to review any GD&L leases and GD&L refused, he felt that GD&L was excessive, but he did not attempt to negotiate a lower fee.

Petitioner purports to be an industry expert, yet he was unaware of the only two recognized worldwide container registers. Petitioner did register his containers, but that was with GD&L's own registry system.

Petitioner never insured his containers or determined whether GD&L was insuring them. He did not know the name of the manufacturer of the containers he purportedly purchased. A prudent investor that had made an $100,000 purchase of property would have done more. Based on the record before us, we must conclude that petitioner is liable for the additions to tax for negligence.

The next issue for decision is whether petitioner is entitled to Schedule C deductions beyond those allowed by respondent relating to an investment in a wind turbine during the years 1985 and 1986. Specifically, petitioner contends that he is entitled to four deductions relating to the wind turbine: property taxes paid during the year 1985, and legal, telephone, and travel expenses paid during the year 1986.[3]

Section 162 provides for a deduction of ordinary and necessary expenses incurred in carrying on a trade or business.

Deductions are strictly a matter of legislative grace. New Colonial Ice Co. v. Helvering, 292 U.S. 435 (1934). The taxpayer has the burden of proving his entitlement to all deductions claimed. Rule 142(a); Welch v. Helvering, 290 U.S. 111 (1933). Moreover, a taxpayer is required to substantiate claimed deductions by maintaining the records needed to establish

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[3]We are assuming petitioner is not challenging respondent's determination relating to his deduction for dues expenses because he has not addressed this issue on brief.

his entitlement to such deductions. Sec. 6001; Sec. 1.6001-1(a), Income Tax Regs.

Petitioner claims that he is entitled to a property tax deduction for the year 1985, but he has no record of a 1985 property tax bill or payment of such a bill. Petitioner claims that he is entitled to a deduction of $47 in legal expenses, but he cannot recall what the legal expense related to. Petitioner claims that he is entitled to a deduction for $45 in telephone expenses, but admits that the $45 is based on an "educated guess" of the cost of his business calls. Petitioner claims to be entitled to a deduction for $60 in travel expenses, yet he cannot say how he arrived at that amount. Petitioner has not submitted any evidence corroborating his entitlement to such deductions. We are not bound to accept petitioner's unsubstantiated, unverified, undocumented testimony. Tokarski v. Commissioner, 87 T.C. 74, 77 (1986). Accordingly, we find that petitioner has not met his burden of proof and therefore is not entitled to any deductions in excess of those allowed by respondent.

Decision will be entered under Rule 155.

NOT FOR PUBLICATION

FILED
DEC 12 1995
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOHN PAUL MARCINEK, Petitioner-Appellant, -vs- COMMISSIONER OF INTERNAL REVENUE, Respondent-Appellee.	No. 94-70470 Tax Court No. 18099-89 MEMORANDUM

Appeal from a Decision of the United States Tax Court Submitted December 7, 1995[1]*
San Francisco, California

Before: WALLACE, Chief Judge, THOMPSON, Circuit Judge, and SEDWICK,[2]** District Judge

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*The panel unanimously finds this case suitable for decision without oral argument. Fed. R. App. P. 34(a) and Ninth Circuit Rule 34-4.

**Honorable John W. Sedwick, United States District Judge, District of Alaska, sitting by designation.

The Internal Revenue Service (IRS challenged the returns of numerous taxpayers who invested in a tax shelter marketed by Gold Depository and Loan Company (GD&L). One of them, John Paul Marcinek, appeals from a decision of the tax court affirming the IRS's assessment of additions to tax and penalties. The tax court exercised jurisdiction pursuant to 26 U.S.C. §§ 6213, 6214 and 7442. We have jurisdiction over Marcinek's timely appeal pursuant to 26 U.S.C. §§7842(a) and 7483. We affirm.

26 U.S.C. §6653(a)(1) provides that "there shall be added to the tax" a penalty for underpayment due to negligence. "The Commissioner's imposition of a penalty is presumptively correct; it must stand unless the taxpayers can prove that they were not negligent." Neely v. United States, 775 F.2d 1092, 1095 (9th Cir. 1985).

Negligence is the "lack of due care or failure to do what a reasonable and ordinarily prudent person would do under the circumstances." Id. The standard of due care requires a taxpayer to inquire as to the legality of a tax plan, including the procurement of independent legal advice when it is common knowledge that the plan is questionable. Id. The tax court found that Marcinek failed to make an adequate investigation as to the validity of GD&L's investment plan, which included several features that would alert a prudent investor of its suspect nature. We must accept these findings unless they are clearly erroneous. Wolf v. Commissioner, 4 F.3d 709, 712-13 (9th Cir. 1993) (Wolf).

Marcinek argues that nothing in GD&L's investment plan would indicate to someone with his "longstanding experience" in the transportation container market that it was a fraud. He also asserts that given the features of the plan, he undertook an adequate investigation of its purported investment and tax benefits. Marcinek contacted GD&L and others in the container industry, and he consulted GD&L literature, including opinion letters from GD&L's attorney and accountant.

Marcinek's arguments doe not establish that an ordinarily prudent investor would have invested with GD&L, considering that its plan contained "sufficient warning signs." See Kantor v. Commissioner, 998 F.2d 1514, 1522 (9th Cir. 1993). "In the face of a transaction which clearly lacked economic substance, and which was designed to produce tax benefits out of proportion with total investment," a taxpayer does not exercise due care even when an independent accounting firm prepares the taxpayer's returns. Hildebrand v. Commissioner, 967 F.2d 350, 353 (9th Cir. 1992). The GD&L plan clearly lacked economic substance, and Marcinek concedes that he entered into a sham transaction. The tax court's finding that a "reasonable and ordinarily prudent investor...would have questioned an investment that allowed a taxpayer to claim tax benefits computed on an investment of $100,000 when the investor only paid $5,000 and was not required to sign a promissory note for the balance" is not clearly erroneous. Even in light of this lopsided investment, Marcinek failed to make sufficient inquiries, examine or insure the containers he "purchased" for $100,000, or

investigate what he knew to be an excessive management fee charged by GD&L.

In Wolf, 4 F.3d at 715, we affirmed a negligence finding where the taxpayer was told he would receive a $17,000 investment tax credit the same year he invested only $10,000. Based on similar facts, the tax court's finding in this case is "plausible in light of the record viewed in its entirety." Id. at 712.

AFFIRMED.

Note: This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.